UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 02-747-C

PAUL A. SIMS, ET AL., **PLAINTIFFS**

V. **ORDER**

OHIO CASUALTY INSURANCE COMPANY, ET AL. **DEFENDANTS**

* * * * * * * * * * *

I. Introduction

This matter is before the court on the motions to dismiss or in the alternative for summary judgment of defendants James O. King, Jr. ("King"); Peoples State Bank, Chaplin, Kentucky ("Peoples"); and Nelson Bancorp, Inc., (Docket No. 1); defendants Prudential Insurance Co. of America and Prudential-Bache Securities, Inc. ("the Prudential defendants")(Docket No. 3); defendant Barnett Bank of Tampa ("Barnett")(Docket No. 12): defendant First Union Bank ("First Union")(Docket No. 19); and defendant Ohio Casualty Insurance Co. ("Ohio Casualty")(Docket No. 69) and on the plaintiffs' motion to continue (Docket No. 4).

The plaintiffs in this case are Paul Sims ("Sims"); Warren Pulliam ("Pulliam"); Janice Pulliam; W & J Pulliam, Inc.; Chaplin Insurance Agency, Inc.; and Kerry Pulliam (collectively "the plaintiffs"). The defendants in this case are Ohio Casualty; Nelson Bancorp, Inc.; Peoples; King; Barnett; the Prudential defendants; U.S. Mortgage & Trust Company, Inc. ("U.S. Mortgage"); and J.R. Horn ("Horn"); and First Union (collectively "the defendants").

The plaintiffs seek recovery against all the defendants for RICO violations (Count IV0, RICO Conspiracy (Count V), indemnity and contribution (Count iii), theft by deception

(Count VI), engaging in organized crime (Count VII), fraud (Count VIII), intentional infliction of emotional distress (Count IX), outrageous conduct (Count X), and punitive damages (Count XIV). The plaintiffs seek a recovery from Ohio Casualty under the Unfair Claims Settlement Practices Act (Count I). Pulliam seeks damages from King for breach of fiduciary duty (Count XI) and a declaratory judgment concerning the February 25, 1988 contract between Pulliam and King(Count XIII). Pulliam also seeks a recovery from Peoples for an amount Peoples allegedly failed to pay him in 1986 (Count XII).

II. Statement of the Case

From December 1985 to December 1986, Donald Tibbitts ("Tibbitts") and Benham Mirzaian, Agents of Prudential. engaged in schemes to defraud Prudential, its customers, and other financial institutions ("the Tibbitts scheme")(¶ 122k-n, p-ee)[14] As part of the scheme, Tibbitts allegedly used his position at Prudential to obtain a substantial investment from the Peoples board and to procure loans from Barnett using fraudulent letters of credit; Tibbitts also allegedly gave bad checks to Peoples, created substantial overdrafts at Peoples, and wired money from Barnett to Peoples to cover the overdrafts. *Id.* Pulliam was president of Peoples at the time of the Tibitts scheme. In 1990, Pulliam was convicted of one count of bank fraud and three counts of aiding and abetting for his participation (certifying checks) in the Tibbitts scheme. (Criminal Judgment, Exhibit to Motion to Dismiss of Defendants Peoples, King and Nelson Bancorp 1C).[15]

---

1. A paragraph number without more indicates that the allegations come from the plaintiffs' 2002 complaint.

[15]"A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice. *New England Health Care Employees Pension Fund v. Ernst & Young LLP,* 336 F.3d 495, 501-02 (6th Cir.

A. The Restitution Agreements between Peoples and Pulliam

On December 17, 1986 (after the Tibbitts scheme was uncovered), King, a director of Peoples, allegedly induced Pulliam to sign a restitution agreement guaranteeing that Pulliam would indemnify Peoples for any losses arising from Pulliam's actions in connection with the scheme. King also allegedly induced Pulliam to sign a separate option agreement giving King the option to buy all of Pulliam's stock at below market value, to tender his stock certificates to Peoples, and to resign as president of Peoples. Pulliam claims that the agreements are void because of lack of consideration, misrepresentations by King, duress, and King's breach of fiduciary duty. (¶¶ 38t-v, 169a-i, 170-73, 184-87).[16]

On December 18, 1987, Pulliam filed an action against Peoples and King in Nelson Circuit Court, 87-CI-395, seeking rescission of these December 17, 1986, agreements based on lack of consideration, fraud, and duress (Exh. 1E). This action culminated in a settlement agreement on February 25, 1988, in which Pulliam admitted to causing overdrafts on accounts at Peoples; agreed to remain liable to Peoples for losses, specifically including any claims by Barnett, arising from Pulliam's conduct in connection with the Tibbitts scheme; and agreed to release King and Peoples from all claims "relating to in any way the claims which are of could have been the subject of the suit and any claims Pulliam now has against the Bank and James O. King, Jr."

2003)(allowing the use of a complaint from a prior fraud case to prove that plaiintiff had actual or constructive knowledge of the facts underlying the claim as of the date of the prior complaint).

[16]This is the first time that Pulliam has expressly claimed a fiduciary breach by King; however, the q987 complaint and the 1993 motion to set aside judgment make it clear that Pulliam was aware of the alleged fiduciary breach long ago. The other claims are alleged in ¶ 26t-v of a substantially similar complaint filed by the same plaintiffs in the Middle District of Florida in 1997 ("Tampa complaint)(Exhibit to Motion to Dismiss of Defendant Ohio Casualty 69 K) and the 1987 Complaint (Exh. 1E).

(Exh. 1F). The court accepted the settlement agreement and dismissed the action with prejudice on February 25, 1988 (Exh. 1H).

Pulliam claims that the settlement agreement is invalid because King, in collusion with Ohio Casualty, coerced him to sign it (¶¶ 92, 169j). Pulliam argued the same grounds in his 1993 motion in state court to set aside the Nelson Circuit Court judgment under C.R. 60.02; Pulliam claimed that King and Peoples had fraudulently induced him to sign the settlement agreement by concealing the pending claim of Ohio Casualty (Exh. 1J; see Trial Court's findings, Exh. 1D). The court denied the motion in December 1993, finding that Pulliam had not been misled and noting that three years was an unreasonable delay in filing the motion (Exh. 1D). The plaintiffs have made no relevant new allegations, beyond those made to the Nelson Circuit Court, concerning the validity of the Peoples-Pulliam settlement agreement.

B. The Barnett Settlement

On February 1, 1988, Barnett filed a suit against Peoples in Jefferson Circuit Court, 99-CI-00812, seeking reimbursement for sums it had wrongfully paid to Peoples as a result of Pulliam's role in the Tibbitts scheme (¶ 109). Barnett asserted in paragraph 28 of its complaint against Peoples that Prudential-Bache refused to make good on letters of credit, resulting in a $562,000 loss to Barnett (¶ 122; Exh. 1F). In 1989. Barnett disclosed documents to Peoples (and Ohio Casualty) indicating that Barnett had actually entered into a 1987 settlement with Prudential under which Barnett received $282,500 in reimbursement (¶ 99). As part of the settlement, Prudential had agreed not to "treat any other lending institution more favorably that . . . Barnett" (¶ 122ff). Despite its knowledge of the Prudential agreement, Peoples settled with Barnett on October 12, 1989 (¶ 100). Pulliam never intervened in the action.

The plaintiffs allege that Peoples and Ohio Casualty breached their duty to Pulliam by failing to defend *Barnett v. Peoples,* failing to tender him the defense,

expressly refusing to disclose settlement terms to Pulliam and get his consent, and failing to disclose the Prudential settlement to him (¶¶ 38a, h. i-n, ee, 88-90, 101, 118-120). The plaintiffs allege that Barnett knowingly misrepresented to the court that it had not received a $282,500 reimbursement from Prudential (¶¶ 38r, 99. 122i-j), that Ohio Casualty and Peoples knew or should have known of the reimbursement and that Barnett was attempting to get a double recovery (¶¶ 38w, 99), and that the Prudential settlement provided an absolute defense in the Barnett action (W
101).[17] The plaintiffs claim that Barnett and Peoples failed to implead Pulliam even though he was an indispensable party (¶¶ 86-87); that First Union's wrongful refusal to honor a check was the cause of Barnett's injuries (¶ 122f); that Barnett failed to assert claims against First Union and Barnett's insurer, Aetna (¶ 122g, h); that the Prudential agents were the culpable parties (¶ 122 k-n, p-ee); and that Prudential agreed to give favorable treatment to Barnett (¶ 122ff). The plaintiffs claim generally that the defendants are all involved in a conspiracy to defraud the plaintiffs by concealing the available defenses to the 1988 Barnett claim.

Ohio Casualty paid the settlement on behalf of Peoples (Order denying motion to set aside 1992 judgment, 69E). On September 27, 1989, Peoples assigned to Ohio Casualty its right to indemnification from Pulliam. *Id.* On May 25, 1990, Ohio Casualty filed suit against Pulliam in the western District of Kentucky, C-90-0367-L-A, seeking indemnification for the $225,000.82 it allegedly paid Barnett under the settlement (¶ 34). In July, 1992, the jury returned a verdict for Ohio Casualty in the amount of $200,000 (¶ 36). The plaintiffs allege that this judgment was improper because of the defects in the Barnett settlement; that Peoples could not validly assign the indemnity contract (¶ 38c, d); that Ohio

---

4. In paragraph 26w of the Tammpa complaint, the plaintiffs likewise claimed that "Ohio Casualty knew, or should have known, that Barnett Bank had entered into a settlement agreement with Prudential and thae Peoples had alleged in the underlying action that Barnett Bank had already received restitution from Prudential and was attempting to secure a 'couble recovery from Peoples Bank' „ (Exh. 69K).

Casualty and Peoples failed to demand apportionment of liability in the Barnett suit (¶ 38p); that Ohio Casualty failed to seek judgments against Prudential and others (¶¶ 38aa-cc, 122o);[18] that Ohio Casualty failed to execute against collateral held by Peoples (¶ 139); that Ohio Casualty was in complete control of the defense to the Barnett action (¶¶ 106, 111, 113); and that Ohio Casualty failed to conduct an adequate investigation before settling the Barnett action (¶ 139).

In October 1995, Pulliam filed a motion to set aside this 1992 verdict, alleging that Ohio Casualty had failed to tender to Pulliam the defense of the Barnett action; that the indemnity contract was not assignable; that Jefferson County was an improper venue for *Barnett v. Peoples;* and that the agreed settlement resulted from fraud and collusion. (Pulliam's Memorandum in Support of the Motion to Set Aside, Exh. 69D, at 151-52). The Jefferson Circuit Court denied all of these claims (Order Denying Motion to Set Aside 1992 Judgment, 69E, at 428-29).

On April 12, 1993, Ohio Casualty filed an enforcement action in the Nelson Circuit Court, Action 93-CI-00130, seeking to set aside allegedly fraudulent conveyances made by Pulliam (¶ 50). This action is still pending (¶ 51). In addition to this action, from February 8 to December 10, 1993, Ohio Casualty levied against the income and property of Pulliam, including the joint bank account of Pulliam and Janice Pulliam; filed lis pendens against property bought by Sims and Kerry Pulliam from W & J Pulliam, Inc.[19]; seized W & J Pulliam, Inc. stock representing 37.5% of the stock of Chaplin Insurance Agency[20]; and caused other related harms (¶¶ 39-83). The plaintiffs claim financial harm,

---

5. The plaintiffs made the same allegations of failure to seek apportionment and failure to recover from other paties in paragraphs 26p and aa-cc of the Tampa complaint.

6.W & J Pulliam, Inc., appears to be owned and operated by Pulliam and Janice Pulliam.

7. Chaplin Insurance Agency is also known as Whitehouse & Pulliam Insurance Agency and is owned in part by Pulliam (¶ 29).

mental anguish, and emotional distress as a result of the pending legal actions (¶ 84).

In April 1997, the plaintiffs filed a complaint in the Middle District of Florida, 97-846-CV-T-17-A, against Ohio Casualty, Barnett, and Prudential alleging substantially the same facts as the complaint before this court (Exh. 69K).

In 2002, the plaintiffs filed a motion to file an amended answer and counterclaim in the Nelson Circuit Court action, 93-CI-00130 (Exh. 1K). The allegations in the proposed amended answer are the same as the allegations made in the current complaint, See *id.* the plaintiffs stated that the facts underlying the counterclaims were unknown to them until after document production on July 14, 2000, and subsequent depositions clarifying the meaning of the documents. *Id.* The plaintiffs further stated that the facts could not have been discovered earlier through due diligence because Ohio Casualty deliberately concealed them. *Id.* After the state court denied the motion (Exh. 1L0, the plaintiffs filed the current action.

C. Claims Not Related to the Central Facts.

Under Count II, the plaintiffs allege that Ohio Casualty attached an IRA and a life insurance policy in violation of state law in 1993 (¶¶ 134-136). Under Count XII, the plaintiffs allege that the directors of Peoples voted to pay each director $1,200 for services on or about December 1, 1986; Pulliam was a director at the time but was never paid (¶¶ 191-193).

III. Federal Claims

A. RICO (Count IV)

1. Elements

The plaintiffs have alleged violations of an unspecified subsection of 18 U.S.C. § 1962. To prove a violation of RICO under 18 U.S.C. § 1962(a), the plaintiffs must show injury caused by the use of income derived from a

pattern of racketeering *Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir. 1990). To prove a violation of § 1962(b), the plaintiffs must show that a defendant acquired or maintained an interest in an enterprise through racketeering. *ADVOCACY Organization for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 328-29 (6th Cir. 1999). The plaintiffs have alleged neither injury from use of the income nor acquisition of an interest through racketeering by any defendant, so the court focuses its discussion on § 1962(c).[21]

Section 1962(c) requires that 1) a person 2) associated with an enterprise engaged in interstate commerce 3) participate in the conduct of the affairs of the enterprise 4) through a pattern of racketeering.

The person accused of the violation and the enterprise must be separate and distinct entities. *Cedric Kusher Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001). Under 18 U.S.C. § 1961(4), "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." If the enterprise is not a legally recognized entity, then the plaintiffs must allege an association-in-fact. "To satisfy the enterprise requirement, an association in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages." *Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir. 1993)(citing *United States v. Turkette*, 452 U.S. 576, 583)1981). Some sort of organizational structure or chain of command is required; this takes simple conspiracies out of the scope of RICO. *VanDerBroeck v. Common Point Mortgage Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000).

In order to participate in the conduct of the affairs of the enterprise, a person must participate in the "operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993).

---

8. To the extent that King acquired an interest in an enterprise through his 1986 option to purchase stock of Nelson, any alleged injury from this purchase became complete in 1988 then King exercised the optioin. Pulliam was aware of the alleged fraud and coercion surrounding the 1986 agreement in 1987 when he filed his complaint against Peoples and King. An claim based on this injury is barred by the four-year statute of limitations on RICO claims in *Agency Holding Corp v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987), as discussed in section IV (Statute of Limitations).

Under 18 U.S.C. § 1961(5), a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." The plaintiffs allege as predicate acts satisfying this requirement the following crimes listed in 18 U.S.C. § 1961(1): bank fraud,[22] wire fraud,[23] and extortion under the Hobbs Act.[24]

---

9. 18 U.S.C. § 1344, Bank Fraud, states:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice–(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; . . . „

10. 18 U.S.C. § 1343, Fraud by wire, radio, or television, states:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . . . „

[24]18 U.S.C. § 1951, Interference with commerce by threats or violence, states:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person pr property in furtherance of a plan or purpose to do anything in violation of this section . . .

. . .

(2) The term 'extortion' means the obtaining of preperty from

2. Sufficiency of pleadings

a. Enterprise and conduct of affairs

With the exception of Ohio Casualty and King, the plaintiffs have failed to allege an enterprise with which the defendants are associated. A plaintiff must plead precisely the enterprise alleged in a RICO claim. *See Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989). The plaintiffs allege generally that each of the corporate defendants is an enterprise. In order to state a claim under RICO, the plaintiff must allege that a defendant participates in the conduct of affairs of an enterprise that is separate from the defendant itself. A corporation does not violate RICO by participating in the conduct of its own affairs. The complaint fails to allege that any defendant other than Peoples is an enterprise whose affairs have been conducted by other persons. It is not a RICO violation for Peoples to conduct its own affairs. With regard to the other defendants, the plaintiffs have alleged that Ohio Casualty and King have been involved in the conduct of the affairs of Peoples – Ohio Casualty during the Barnett settlement negotiations only and King as an employee of Peoples. The plaintiffs have failed to allege such conduct by the other defendants.

The plaintiffs also have not alleged an association-in-fact among the defendants sufficient to create an enterprise. They have failed to allege any kind of organizational structure among the defendants independent of the alleged "pattern of racketeering." The "enterprise" and "participation in the conduct of affairs" elements have been sufficiently alleged only with regard to King and Ohio Casualty; for this reason, the RICO claims against the other defendants fail.

B. Racketeering activities

Rule 9(b) of the Federal Rules of Civil Procedure requires fraud claims to be pled with particularity. This pleading requirement applies to fraud claims under RICO. *See Blount Financial Services, Inc., v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987)(requiring a RICO complaint alleging mail fraud to "state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the

---

another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. „

plaintiff's reliance on defendant's false statement of fact.") In *Rotella v. Wood*, the Supreme Court noted that Rule 11(b)(3) does give plaintiffs some latitude to make factual allegations that they believe can be proved after discovery; the Court, however, did not excuse the plaintiffs from the pleading requirements in Rule 9(b). 528 U.S. 549, 561 (2000). Rule 9(b) does not apply to the Hobbs Act claims, but the pleadings must still be sufficient to put the defendants on notice.

The plaintiffs have failed to allege two predicate acts by any of the defendants. The plaintiffs have alleged only one predicate act by King. the plaintiffs allege that King made fraudulent misrepresentations in 1986 concerning his intention to aid Pulliam and that Pulliam relied on the misrepresentation in entering into the q986 agreements (¶¶ 169-72). The plaintiffs have alleged no other misrepresentations by King. The plaintiffs do allege numerous times that King coerced Pulliam to sign the 1986 agreement (¶ 169a,g,h) and the 1988 settlement agreement (¶ 92)(alleging also that Ohio Casualty conspired to coerce Pulliam). In claiming coercion, the plaintiffs do not, however, allege any "wrongful use of actual or threatened force, violence, or fear" sufficient to state a claim for extortion under the Hobbs Act.[25] Because they allege only one predicate act, the plaintiffs have failed to state a claim for a RICO violation by King.

The plaintiffs have failed to plead with particularity fraud by any defendant other than King. In a civil RICO case based on mail fraud, the Sixth Circuit stated that a plaintiff "must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact." *Blount Financial Services*, 819 F2d at 152. The plaintiffs plead one misrepresentation by Barnett – the statement in paragraph 28 of the 1988 complaint that Prudential had refused to make good on letters of credit leading to a loss for Barnett (¶122i-j). The plaintiffs' complaint, however, indicates that there was no reliance on the misrepresentation (¶ 38w).("Peoples had alleged in the underlying complaint that Barnett had already received restitution from Prudential.") Even if the plaintiffs had alleged reliance on this misrepresentation, they would still have pled only one predicate act

---

[25]In ¶ 92, the plaintiffs allege that Oio Casualty conspired with King to induce and coerce Pulliamto sign the q988 settlement agreement. An extortion claim against Ohio Casualty also fails for lack of an allegation of wrongful use of threatened force,.

by Barnett.

The plaintiffs have alleged one act of misrepresentation by a First Union agent in orally agreeing to honor a check that it later refused to honor (¶ 122f). The plaintiffs have not alleged any reliance by Barnett on that promise; because no reliance has been alleged, the plaintiffs have failed to allege fraud by First Union. The plaintiffs have also failed to allege th at First Union obtained any property of someone else through its predicate acts as required to state a claim under the wire and bank fraud statutes. The plaintiffs have not alleged any other predicate acts by First Union so they have failed to state a claim for a RICO violation.

The plaintiffs have alleged no misrepresentations by the Prudential defendants, only fraud by Prudential agents Tibbitts and Mirzaian. The plaintiffs have not alleged that the Prudential defendants should be liable for the actions of Tibbitts and Mirzaian; the plaintiffs have only nebulously alleged concealment of facts. Even if the plaintiffs had sufficiently alleged liability for the actions of the agents, the Prudential defendants would not be liable for RICO violations because the plaintiffs have failed to plead an enterprise separate from the corporate defendant. *See Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993)("an organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself.").

The plaintiffs have alleged no misrepresentations by Horn, U.S. Mortgage, Peoples, Nelson, or Ohio Casualty. Because the plaintiffs have failed to plead either two predicate acts or an enterprise for each defendant, the plaintiffs have failed to state a claim for a violation of RICO against any of the defendants.

B. RICO Conspiracy (Count V)

To prove a violation of § 1962(d),[26] a plaintiff must prove that the overt act in furtherance of the conspiracy is itself a RICO violation. *Beck v. Prupis*, 529 U.S. 494, 505-06 (2000). Where a plaintiff has failed to allege a violation of § 1962(a)-(c), a conspiracy claim under § 1962 also fails. *See Miller v. Norfolk Southern Ry. Co.*, 183 F.Supp.2d 996, 1003 (N.D. Ohio 2002)(citing cases from other circuits). Because the plaintiffs have

---

[26]18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. „

failed to state a claim for a RICO violation by any of the defendants, they have failed to state a RICO conspiracy claim.

IV. State Claims
A. Unfair Claims Settlement Practices Act (Count I)(Ohio Casualty)

1. General Description

The Unfair Claims Settlement Practices Act[27] imposes duties on organizations in the business of insurance to act reasonably in investigating, defending, and steeling claims against insured individuals. A private right of action under the act is created through K.R.S. 446.070.[28] *State Farm Mut. Auto Ins. Co. v.*

---

[27]K.R.S. 304.12-230, Unfair claims settlement practices, states:

"it is an unfair claims settlement practice for any person to comit or perform any of the following acts or omissions:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policits;

(3) failing to adopt and implement reasonable standards for the proompt investigation of claims arising under insurance policies; . . .

(6) Not attmepting in good faith to effectuate proompt, fair and equitable settlements of claims in which liability has become reasonably clear; . . .

[28]K.R.S. 446.070, Penalty no bar to civil recovery, states:

"A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation, „

Reeder, 763 S.W.2d 116, 118 (Ky. 1988), The Act in interpreted liberally to provide relief to persons whom the Act was designed to protect. *Id.*

2. Sufficiency of Pleadings.

The plaintiffs have alleged that Pulliam's indemnity contract with Peoples gave rise to a duty to Pulliam on the part of Ohio Casualty to investigate and defend under the Unfair Claims Settlement Practices Act. Some factual development is necessary to determine the validity of this allegation and whether that duty was breached. Because summary judgment is improper when the plaintiffs have not been granted adequate time for discovery, the court will not dismiss at this stage of the case. *See White's Landing Fisheries, Inc., v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994).

B. Wrongful Attachment (Count II)(Ohio Casualty)

Life insurance policies and IRA accounts may be exempt from judgment execution under K.R.S. 427.010 and 427.110. The statute of limitations for actions upon liability created by statute is five years. K.R.S. 413.120(2). This limitations period is inappropriate; the statutes creating the exemption from judgment do not specify a means of enforcement, so they do not create the liability. *See Wood v. Wingfield*, 816 S.W.2d 899, 904 (Ky. 1991)(applying this reasoning to the intestacy statute). The *Wood* Court reasoned that the ten-year limitations period in K.R.S. 413.160 (actions for relief not provided for by statute) rather than the five-year period in K.R.S. 413.120(7)(actions for injury to the rights of the plaintiff) applies to a claim against the administrator and heirs of the estate. *Id.* The administrator had allegedly injured the plaintiff; the heirs were merely the beneficiaries of that injury. The court found the five-year statute of limitations inapplicable because it implied that only the injuring party should be sued. *Id.*

In the present case, Pulliam has alleged a statutory right not to have his life insurance and IRA attached; this is similar to the right of the plaintiff in *Wood* to share in the estate under the intestacy statute. In the present case, unlike *Wood*, only the injuring party is a defendant to this claim. Therefore, the five-year limitations period in K.R.S. 413.120(7) applies to the claim for

---

This section also serves as the basis for the plaintiffs' civil claims of theft by deception and engaging in organized crime.

wrongful attachment.

The plaintiffs state in their complaint that Ohio Casualty "attempted to garnish" the life insurance policy and IRA in 1993. Whether these are in the class of assets exempted from judgment and when garnishment actually occurred are questions that require factual development, thus prohibiting dismissal of these claims at this early stage in the case.

C. Indemnity and Contribution (Count III)

1. Elements

Indemnity is allowed when 1) the party who paid the judgment was only constructively liable in tort (as with vicarious liability) or 2) two parties are joint tortfeasors and the lesser seeks indemnity from the primary tortfeasor. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000).

KRS 412.030 allows "one who had satisfied a negligence claim to assert a claim for contribution in a separate action against a joint tortfeasor." *Degener,* 27 S.W.3d at 779.

2. Statute of limitations and pleadings

Indemnity and contribution are inappropriate here. The five-year statute of limitations in 412.120(7) applies to suits for indemnity and contribution. *Degener,* 27 S.W.3d at 782. The underlying suit for which the plaintiffs seek indemnity and contribution is *Barnett v. Peoples*, which was settled in 19889. Pulliam was found to be contractually liable in 1992. The Tampa complaint indicates that the plaintiffs were aware of their cause of action in April 1997; the statute of limitations began to run by that time. Because more than five years elapsed between April 1997 and the November 2002 filing of this case, the claims are time-barred.

In addition, assuming Pulliam obtained People's rights to indemnity and contribution through his contract, indemnity is inappropriate here. The plaintiffs have failed to allege that one of the defendants is a primary tortfeasor, and Peoples was not alleged to be vicariously liable for the acts of any of the defendants.

D. Theft by Deception (Count VI)

1. Elements

To prove theft by deception under K.R.S. 514.040,[29] a plaintiff must show that the defendant obtained the property of another by deception with intent to deprive that person of the property. Deception occurs when the defendant intentionally creates a false impression; conceals information affecting a decision to transact; or, as a fiduciary, fails to correct a false impression.

2. Sufficiency of pleadings

The plaintiffs have failed to plead any misrepresentations by any defendants other than King for reasons discussed under Count IV (RICO). The plaintiffs have also failed to allege that anyone induced another person to hand over property through the concealment of information or the failure to correct a false impression. The plaintiffs have further failed to allege that the Prudential defendants, First Union, Horn, U.S. Mortgage, or Nelson obtained the property of another. The theft claim against King by Pulliam is barred by *res judicata* because it could have been brought with reasonable diligence in the 1987 action. See discussion under Count XIII (Declaratory Judgment). Because the other plaintiffs were not parties to the a987 action, they are not similarly barred by *res judicata.*

E. Engaging in Organized Crime (Count VII)

---

[29]K.R.S. 514.040, Theft by deception, states:

"(1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

(a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind;

(b) Prevents another from acquiring information which would affect judgment of a transaction;

(c) Fails to correct a false impression which the deceiver previously created of reinforced or which the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship; . . . „

1. Elements

To prove a claim of engaging in organized crime under K.R.S. 506.120[30], the plaintiffs must show that a defendant committed or conspired to commit theft[31] in collaboration with at least five other people on a continuing basis.[32]

2. Sufficiency of pleadings

The plaintiffs have pled one theft offense by King for

---

17. K.R.S. 506.120, Engaging in organized crime, states:

"(1) A person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall not do any of the following: . . .

(e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

. . .

(3) As used in this section "criminal syndicate „means five (5) or more persons collaborating to promote or engage in any of the following on a continuing basis:

(a) Extortion or coercion in violation of 514.080 or 521.020; . . .

(c) Any theft offense as defined in KRS Chapter 514: . . . „

18. The plainiffs have not alleged extortion or coercion in violation of K.R.S. 514.080 or 532.020 despite repeatedly accusing King of "coercion. „The former section reuires threats to use force, commit a crime, accuse someone of a crime, expose secrets, or wrongfully use a public position. The latter requires bribery of an official.

19. The plaintiffs have alleged that the other defendants conspired to deny Pulliam his defenses to the Barnett action (¶ 37) but have not alleged that the other defendants were involved in the 1986 agreements between Pulliam and King.

reasons discussed under Count VI (Theft by Deception). The plaintiffs have alleged that defendant King collaborated with attorneys Strauss and Pritchett to induce Pulliam to sign the 1986 agreement (¶ 169). The plaintiffs have not alleged that anyone else conspired to commit this theft offense.[33] Because the plaintiffs have alleged only three members of the conspiracy, the plaintiffs have not pled the existence of a criminal syndicate of five or more persons. The plaintiffs have thus failed to plead the offense of engaging in organized crime.

F. Fraud (Count VIII)
1. Elements

Fraud requires 1) a material representation 2) which is false, 3) is known to be falsely or recklessly made, 4) is made to induce reliance, 5) is actually relied on, and 6) causes injury. *United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky. 1999).

2. Sufficiency of pleadings

The plaintiffs have failed to plead with particularity, as required by Rule 9(b), any fraud by and defendant other than King for the reasons discussed under Count I with regard to Pulliam, the fraud claim against King is barred by *res judicata;* Pulliam filed a complaint in 1987 against King alleging the same fraud. That case was settled and dismissed with prejudice by the state court, which upheld the validity of the settlement and dismissal in 1993. See discussion under Count XIII (Declaratory Judgment). The fraud claim is not barred with regard to the other plaintiffs since they were not parties to the 1988 settlement.

G. Intentional Infliction of Emotional Distriss and Outrageous Conduct (Counts IX and X)

1. Elements

Intentional infliction of emotional distress and outrage are

---

20. The plaintiffs have alleged that the oether defendants conspired to deny Pulliam his defenses to the Barnett action (¶ 37) but have not alleged that the other defendants were involved in the 1986 agreements between Pulliam and King.

the same offense in Kentucky. *See Osborne v. Payne*, 31 S.W.3d 911, 913 (Ky. 2000). To prove either, the plaintiff must show 1) intentional or reckless conduct 2) that is "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality," 3) causation, and 4) severe emotional distress. *Id.* at 913-14.

2. Sufficiency of pleadings

Ordinary fraud does not rise to the level of outrageous conduct. *Osborne,* 31 S.W.3e at 914. Something more is required. Outrage has been likened to a criminal action for harassment. *Zurich Ins. Co. v. Mitchell,* 712 S.W.2d 340, 343 (Ky. 1986). The conduct must be of the kind that it "truly outrageous, intolerable and which results in bringing one to his knees." *Osborne,* 31 S.W.3d at 914.

The standard for outrage is very high, but the complaint has sufficiently alleged a violation. Because factual development is necessary to determine the validity of the plaintiffs' claims of outrage, the claims will not be dismissed at this stage of the case.

H. Breach of Fiduciary Duty (Count XI)

Pulliam has alleged a breach of fiduciary duty by King, as his accountant, in entering into a conflict-of-interest transaction in 1986. Pulliam claims to have "suffered the loss of his stock in Nelson Bancorp and Peoples, and the profits therefrom" (¶ 188). This claim is *res judicata* because of the 1988 judgment and 1993 denial of the motion. See discussion under Count XIII (Declaratory Judgment).

1. *Debet et detinet* (Count XII)

Pulliam is asking for $1,200 that Peoples owed to him in December 1986 as a result of the vote by the board of directors (¶¶ 191-193). The statute of limitations for actions on contracts not in writing is five years. K.R.S. 413.120(1). An action on a written contract must be brought within fifteen years. K.R.S. 413.090(2). An action for relief not provided for by statute must be brought within ten years. K.R.S. 413.160. However this claim is characterized, it is time-barred because the cause of action accrued in December 1986, more than fifteen years before the filing of this complaint.

In addition, in the 1988 Settlement Agreement, Pulliam

released "any claims Pulliam now has against the Bank and James O. King, Jr." (Exh. 1F) As discussed under Count XIII, the validity of the settlement agreement is *res judicata*. Because Pulliam's claim to the $1,200 existed at the time of the settlement agreement, it is barred by contract.

J. Declaratory Judgment (Count XIII)

Pulliam asks this court to set aside the 1988 settlement agreement with Peoples and King as the product of fraud, coercion, and lack of consideration. Pulliam challenged the validity of this settlement on the same grounds in his 1993 motion to set aside the judgment. The state court considered and denied Pulliam's allegations of fraud and coercion in inducing him to sign the a988 agreement. The state court's decision to uphold the settlement is *res judicata*.

"[W]here there is an identity of parties and an identity of causes of action, the doctrine [of *res judicata*] precludes further litigation of issues that were decided on the merits in a final judgment." *Whittaker v. Cecil*, 69 S.W.3d 69, 72 (Ky. 2002). *Res judicata* also precludes subsequent litigation of "matters that, with the exercise of reasonable diligence, might have been raised at the time." *Id.*

The alleged misrepresentations by the defendants subsequent to the signing of the settlement agreement do not affect the validity of the agreement – they had no impact on Pulliam's decision to sign. The same parties actually litigated and the state court decided the fraud, coercion, and consideration claims in 1993. The only current allegation not also made in 1993 concerning the conduct of the defendants prior to the signing is that King breached his fiduciary duty to Pulliam. The complaint indicates that Pulliam was aware of the facts underlying King's alleged conflict of interest in 1988. Pulliam could have, in the exercise of reasonable diligence, raised this claim in 1993. The validity of the settlement agreement is *res judicata*.

K. Punitive Damages (Count XV of Amended Complaint)

In intentional tort cases, conduct must be malicious, willful, or wanton in order to justify punitive damages. *Fowler v. Mantooth*, 683 S.W.2d 150, 252 (Ky. 1984). The plaintiff must prov the underlying action to receive punitive damages. *Id.* "In order to justify punitive damages [in a negligence case] there must be first a finding of failure to exercise reasonable care, and then an

additional finding that this negligence was accompanied by "wanton or reckless disregard for the lives, safety or property of others.'" *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-390 (Ky. 1985).

To the extent that the plaintiffs have sufficiently pled claims against the defendants, they may be able to recover punitive damages for those claims. Factual development is required to determine whether the plaintiffs can meet the standard for punitive damages; therefore, the punitive damage claim will not be dismissed.

IV. Statute of Limitations

A. RICO and RICO conspiracy

The statute of limitations for civil RICO claims is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (987). The statutory period begins to run when the party knows, or should have known through the exercise of reasonable diligence, that he has been injured. *Rotella,* 528 U.S. at 554-55 (rejecting "last predicate act" rule and "pattern discovery" rule for accrual). The statute of limitations begins to run when the injury is discovered, not at the time of a later predicate act.[34]

The plaintiffs have alleged that the defendants concealed the cause of action from them, preventing them from discovering their injury. Even if this court were to allow equitable tolling based on the concealment allegations, the plaintiffs were aware of the facts underlying their current allegations no later than April 1997, when they filed a complaint in the Middle District of Florida.

The plaintiffs argue that they were not aware of the facts allegedly concealed by the defendants until after receiving documents from Ohio Casualty during discovery. The fact that was allegedly concealed in that Prudential reimbursed Barnett in the amount of $282,500 prior to Barnett's 1989 complaint against Peoples; the plaintiffs allege that this payment demonstrates that Barnett had already recovered its damages from the Tibbitts fraud and that the suit against Peoples was an attempt to obtain a double recovery for its injuries. Ths plaintiffs allege that this fact would

---

21. The *Rotella* Court diclined to consider whether the statute of limitations would be tolled where the second predicate act necessary to create a RICO claim occurred after the injury. 528 U.S. at 558 n. 4.

have provided Pulliam with a defense to the 1990 Ohio Casualty suit.

If the plaintiffs had not discovered that Barnett had been reimbursed by Prudential until after the documents production in 2000, their RICO claims would not be barred by the statute of limitations. The plaintiffs, however, were aware of the settlement between Prudential and Barnett when they filed a complaint against Ohio Casualty, Barnett, and the Prudential defendants in April 1997. The plaintiffs specifically alleged the following in paragraph 26w of the Tampa complaint:

> The fact that Defendant Ohio Casualty knew or should have known, that Defendant Barnett Bank had entered into a settlement agreement with Defendant Prudential, and that Peoples had alleged in the underlying action, that Defendant Barnett Bank had already received restitution from defendant Prudential and was attempting to secure "a double recovery from Peoples Bank."

The Tampa complaint demonstrates that the plaintiffs had actual knowledge of the Prudential-Barnett settlement in April 1997. *See New England Health Care Employees Pension Fund,* 336 F.3d at 501-02 (finding that prior complaint demonstrated either actual or constructive knowledge of fraud for purpose dismissal under Rule 12(b)(6) motion and statute of limitations). While the plaintiffs may not have known the exact amount of the settlement until 2000, the plaintiffs did know that Prudential had paid Barnett some amount as part of the settlement.

Because the plaintiffs discovered their injury by April 1997 at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. The instant action, however, was not filed until November 2002. Because the statute of limitations is four years, the plaintiffs are barred from pursuing a RICO claim for any injury that was discovered or should have been discovered by November 1998.

B. State Claims

Equitable tolling of the statute of limitations is justified "where a defendant conceals a plaintiff's cause of action so that it could not be discovered by the exercise of ordinary diligence on the plaintiff's part." *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 297 (Ky. App. 1993). Once the plaintiff discovers, or

should have discovered through ordinary diligence, the cause of action, the statute of limitations begins to run. The plaintiff may recover only for injuries arising inside the limitations period. *See Davis v. All Care Medical, Inc.*, 986 S.W.2d 902, 905 (Ky. 1999)(noting that Kentucky has not adopted continuing negligence theory and does not toll statute of limitations until date of last injury); *G & K Dairy v. Princeton Elec. Plant Bd.*, 781 F.Supp. 485, 488-89 (W.D. Ky. 1991)(citing Kentucky cases for proposition that injuries occurring outside statutory period are not actionable even if injury is ongoing).

The plaintiffs in the present case may recover damages only for injuries occurring within the relevant statutory periods. The Unfair Claims Settlement Practices Act claim (Count I), theft by deception claim (Count VI), and engaging in organized crime claim (Count VII) are all governed by the five-year limitations period in K.R.S. 413.120(2)(action upon liabilit5y created by statute). The wrongful attachment claim , as discussed under Count II, is governed by the five-year limitations period in K.R.S. 413.120(7)(action for an injury to the rights of the plaintiff). The indemnity and contribution claim is governed by the same statute of limitations, discussed under Count III.

The statute of limitations on the fraud claim (Count VIII) is five years. K.R.S. 413.120(12). The statute does not begin to run until discovery of the fraud. K.R.S. 413.130(3). The statute of limitations for outrage or intentional infliction of emotional distress is five years under K.R.S. 413.120(7). *See Craft v. Rice*, 671 S.W.2d 247, 251 (Ky. 1984). The statute of limitations on the *debit et detinet* claim has fun, as discussed under Count XII.

For reasons discussed under the RICO statute of limitations section, the statute of limitations has run on Counts ! And VI-X for any injury arising more than five years before the filing of the present complaint (before November 10, 1997).

Injuries Occurring Outside the Limitations Period

Injuries resulting from Ohio Casualty's attachment of Pulliam's income and bank account (¶¶ 39-46) are barred by the RICO statute of limitations to the extent that Ohio Casualty obtained the property prior to November 10, 1988, and by the state statutes of limitations to the extent that Ohio Casualty obtained the property prior to November 10, 1997. Other injuries barred by the statutes of limitations include the following: the seizure of the stock of Pulliam and Janice Pulliam to the extent that Ohio Casualty permanently seized the stock prior ro November 10, 1997

(¶ 47); the abandonment of Kerry Pulliam's insurance practice in 1993 as a result of adverse publicity (¶ 58); the diminished value of the property Sims sold to the Nelson County Board of Education in 1994 (¶¶ 71, 73); injury resulting from Sims & Kerry Pulliam's being forced to negotiate a new mortgage in 1996 (¶¶ 75-76); Ohio Casualty's cancellation of its contract with Whitehouse & Pulliam (which occurred prior to April 1997)(¶ 79; Tampa complaint ¶ 70)' Ohio Casualty's seizure of W & J Pulliam, Inc. stock certificates representing 37.5% of the stock of Chaplin Insurance Agency to the extent that Ohio Casualty permanently seized the stock prior to November 10, 1997 (¶ 83); indemnity or contribution for the 1989 settlement agreement between Peoples and Barnett, on which Pulliam became liable in 1992; and the $1,200 director fee not paid to Pullliam, including interest on that fee (¶¶ 194-95).

The alleged injuries that this court has not found barred by the statute of limitations are: Garnishments by Ohio Casualty within the limitations periods; other "financial loss, mental anguish, emotional distress, upset and harm" arising within the limitations periods (¶¶ 54, 60, 77, 84, 130, 177); costs associated with defending the state court action arising within the limitations periods (¶¶ 81, 84); and wrongful attachment of the life insurance policy and IRA to the extent attachment occurred within the limitations period (¶ 137).

V. Conclusion

With regard to Count IV (Rico)(¶¶ 141-57) and Count V (RICO Conspiracy)(¶¶ 158-61), the plaintiffs' claims are dismissed as to all the defendants. Count III (Indemnity and Contribution)(¶¶ 138-40) is dismissed with regard to all the defendants. Count VI (Theft by Deception)(¶¶ 162-64) is dismissed with regard to all the defendants except King; plaintiff Pulliam's claim against defendant King is dismissed. Count VII (Engaging in Organized Crime)(¶¶ 165-67) is dismissed with regard to all defendants/ Count VIII (Fraud)(¶¶ 168-74) is dismissed with regard to all defendants except King; plaintiff Pullliam's claim against defendant King is dismissed. Plaintiff Pulliam's claim against defendant King under Count XI (Breach of Fiduciary Duty)(¶¶ 183-89) is dismissed. Plaintiff Pulliam's claim against defendant Peoples under Count XII (*Debet et Detinet*)(¶¶ 190-95) is dismissed. Plaintiff Pulliam's claim against defendant King under Count XIII (Declaratory Judgment)(¶¶ 196-99) is dismissed.

Count I (Unfair Claims Settlement Practices Act)(¶¶ 102-32) against defendant Ohio Casualty remains with regard to all the

plaintiffs. Plaintiff Pulliam's claim against defendant Ohio Casualty under Count II (Wrongful Attachment)(¶¶ 133-37) remains. The claim against King under Count VI (Theft by Deception)(¶¶ 162-64) remains for all plaintiffs except Pulliam. The claim against King under Count VIII (Fraud)(¶¶ 168-74) remains for all plaintiffs except Pulliam. The claims against all the defendants under Count IX (Intentional Infliction of Emotional Distress)(¶¶ 175-78) and Count X (Outrageous Conduct)(¶¶ 179-82) remain with regard to all plaintiffs. The claim under Count XIV of the first amended complaint (Declaratory Judgment--Video Communications, Inc., Stock)(¶¶ 200-21) remains; the validity of this claim is not before the court on the defendants' motions to dismiss. The claim against all defendants under Count XV of the first amended complaint (Punitive Damages)(¶¶ 222-24) remains with regard to all plaintiffs.

Damages for injuries arising from the defendants' conduct are barred t the extent that the injuries occurred outside the statutory limitations periods, as discussed in section IV (Statute of Limitations).

This action involves non-diverse parties – all of the plaintiffs and five of the defendants are citizens of Kentucky (¶¶ 7-16, 22-27) The case was removed from state court based on the federal question jurisdiction created by the RICO claims pursuant to 28 U.S.C. § 1331. Because the RICO claims have been dismissed for failure to plead a RICO violation, this court will remand the action to the Nelson Circuit Court.[35]

Accordingly,

IT IS ORDERED THAT the plaintiffs' submission docketed as "First Amended Complaint" (Docket No. 72) be **CONSTRUED** as a motion for leave to file an amended complaint and that the motion for leave to file is **GRANTED.**

IT IS FURTHER ORDERED THAT the motions to dismiss or, in the alternative, motions for summary judgment of defendants King, Peoples, and Nelson (Docket no. 1), the Prudential defendants (Docket No. 3), defendant Barnett (Docket

---

22. This court is permitted to keep this case pursuant to supplemental jurisdiction but declines to do so. *See* 28 U.S.C. § 1367 (c)(3) (allowing the district court to decline to exercise supplemental jurisdiction where it "has dismissed all claims over whhich it has original jurisdiction).

No. 12), defendant First Union (Docket No. 19), and defendant Ohio Casualty (Docket No. 69) be **CONSTRUED** as motions to dismiss or, in the alternative, for summary judgment on the plaintiffs' original complaint and so much of the plaintiffs' amended complaint as is identical to the plaintiffs' original complaint.

IT IS FURTHER ORDERED THAT the defendants' motions to dismiss or, in the alternative, for summary judgment are **GRANTED IN PART** and **DENIED IN PART,** as set forth in the order.

IT IS FURTHER ORDERED THAT the remaining state claims are **REMANDED** to the Nelson Circuit Court.

IT IS FURTHER ORDERED THAT the plaintiffs' motion to continue (Docket No. 4) is **DENIED AS MOOT.**

This is the 24th day of September, 2003.

Jennifer B. Coffman, Judge
United States District Court
Western District of Kentucky